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No. 95-365

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

JAMES GRIFFIN LANE,

Petitioner,

v.

FEDERICO F. PENA, SECRETARY OF TRANSPORTATION, *ET AL.*,

Respondents.

On Petition for A Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF *AMICI CURIAE* AMERICAN COUNCIL OF THE BLIND, BAZELON CENTER FOR MENTAL HEALTH LAW, DISABILITY RIGHTS EDUCATION AND DEFENSE FUND, EPILEPSY FOUNDATION OF AMERICA, NATIONAL ALLIANCE FOR THE MENTALLY ILL, NATIONAL ASSOCIATION OF THE DEAF, NATIONAL ASSOCIATION OF PROTECTION AND ADVOCACY SYSTEMS, NATIONAL COUNCIL ON INDEPENDENT LIVING, NATIONAL MULTIPLE SCLEROSIS SOCIETY, NATIONAL PARENT NETWORK ON DISABILITIES, THE ARC, UNITED CEREBRAL PALSY ASSOCIATIONS, AND WORLD INSTITUTE ON DISABILITY, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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BRIEF OF *AMICI CURIAE* AMERICAN COUNCIL OF THE BLIND, *ET AL.*, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

STATEMENT OF INTEREST OF *AMICI CURIAE* [1]

Amici American Council of the Blind, *et al.* are thirteen national advocacy and service organizations that represent and serve the 49 million Americans with disabilities and their families. Each organization is actively involved in working to eliminate historical stereotypes, prejudices and the resulting

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1 This brief is filed with the consent of the parties. Copies of the consent letters are on file with the Clerk.

discriminatory practices and policies that serve to exclude Americans with disabilities from participating as valued and contributing members of our society.

Amici know through experience that the availability of monetary damages to redress violations of civil rights is essential to enforce the guarantee of equal citizenship that has been provided to Americans with disabilities by federal law. In the Petition for A Writ of Certiorari, James Griffin Lane invites the Court to resolve a legal question on which the U.S. Circuit Courts of Appeal are currently in conflict, specifically the question of whether suit for monetary damages will lie against the federal government under Section 504 of the Rehabilitation Act of 1973. *Amici* recognize that Supreme Court interpretations of Section 504, particularly with respect to issues on which lower courts are divided, have a substantial impact on whether the federal mandate of nondiscrimination based on disability will be realized. This is especially true in cases, such as this one, involving construction of the federal government's own liability under this statute, given the broad reach and scope of federal activities, and the pivotal leadership role assigned to the federal government under national civil rights laws. *Amici* therefore submit the following brief in support of petitioner.

Amicus American Council of the Blind (ACB) is the nation's largest nonprofit membership organization of people who are blind or visually impaired. ACB seeks to ensure that blind individuals have the opportunity to participate fully in all aspects of American life and to that end works to promote strong state and federal anti-discrimination laws.

Amicus Bazelon Center for Mental Health Law is a Washington, D.C.-based public interest organization founded in 1972 to advocate the rights of children and adults with mental disabilities. It has brought major cases decided by this Court establishing the rights of people with mental disabilities, and it has participated as *amicus curiae* in this Court in more than a dozen additional cases.

Amicus Disability Rights Education and Defense Fund (DREDF) is the nation's premier law and policy center dedicated to protecting and advancing the civil rights of people with disabilities. DREDF is nationally recognized for its expertise in the interpretation of federal disability civil rights laws.

Amicus Epilepsy Foundation of America is a national nonprofit corporation founded in 1968 to advance the opportunities of the two million persons with epilepsy. The Foundation has a long-standing commitment to eliminating the stereotypes and prejudices that serve to exclude persons with epilepsy from society.

Amicus National Alliance for the Mentally Ill (NAMI) is a national grassroots advocacy organization of families of people with severe mental illnesses and people with these illnesses themselves. Comprised of 140,000 members, with more than 1,000 local affiliates in every state, NAMI's goals are to educate the public about severe mental illnesses and to advocate for the advancement of treatment and services for people with these illnesses. An important part of NAMI's mission is to combat stigma and discrimination against people with severe mental illnesses.

Amicus National Association of the Deaf (NAD) is a national nonprofit organization whose members are deaf adults, parents of deaf children, and professionals in the area of service to individuals who are deaf. NAD is the largest consumer organization of people who are deaf in the United States.

Amicus National Association of Protection and Advocacy Systems (NAPAS) is the national voluntary membership organization of the Protection and Advocacy Systems and Client Assistance Programs. The member agencies of NAPAS are designated by the Governor of their state or territory, and are federally mandated to pursue legal, administrative, and other remedies to protect and promote the legal rights of persons with disabilities. In FY 94, these

agencies provided services to nearly 70,000 persons, reflecting the full spectrum of disabling conditions.

Amicus National Council on Independent Living (NCIL) was established in 1982 as the national voice of independent living centers, which provide advocacy, information and referral services, independent living skills training and peer counseling to people with all disabilities, and which are governed and controlled by people with different types of disabilities. NCIL conducts and coordinates the national advocacy efforts of the Independent Living Movement. and works to ensure that the civil rights of people with disabilities are strengthened and protected by law.

Amicus National Multiple Sclerosis Society (NMSS) is a nonprofit organization which is comprised of 140 chapters and branches with 430,000 members nationwide. Since it was organized in 1946, in its 50 years of service NMSS has been dedicated to ending the devastating effects of multiple sclerosis (MS). As part of its mandate, NMSS promotes laws to overcome discrimination and provide strong remedies for violations of the civil rights of people with disabilities.

Amicus National Parent Network on Disabilities (NPND) is a national membership organization that represents over one million parents and families who have a member with a disability. NPND's mission is to speak as a collective voice representing the perspectives, needs and interests of parents and family members of persons with disabilities.

Amicus The Arc is the largest voluntary organization in the country devoted to securing the rights of, and effective services for, the approximately 7,200,000 Americans with mental retardation. The Arc has a national membership of approximately 120,000 people, including persons with mental retardation and their parents, and has approximately 1,100 state and local chapters throughout the country. Members of Congress, state legislatures, rulemaking authorities, and the courts regard The Arc as a leading advocate for citizens with mental retardation.

Amicus United Cerebral Palsy Associations (UCPA) is a national nonprofit voluntary health organization founded in 1949, which has as its mission to affect positively the quality of life for persons with cerebral palsy and also others with severe disabilities and multiple service needs and the families of both. UCPA assists its 152 affiliates throughout the country in the provision of direct services as well as education and advocacy programs, and other activities advancing the independence, productivity and full citizenship of people with disabilities.

Amicus World Institute on Disability (WID) is a private, nonprofit corporation focusing on major policy issues from the perspective of the disabled community. Founded in 1983 by persons who have been deeply committed to the independent living movement, WID functions as a research center and as a resource for information, training, public education and technical assistance.

SUMMARY OF ARGUMENT

This Court should grant certiorari to resolve a clear split in the Courts of Appeal on a legal issue affecting the federal civil rights of 49 million Americans with disabilities, and to ensure that petitioner is afforded the monetary damages intended by Congress to remedy the illegal discrimination that he has suffered at the hands of the federal government.

Federal appellate courts are starkly divided on the sole legal issue presented by the Petition: whether Section 504 of the Rehabilitation Act of 1973 authorizes monetary damages against the federal government. The Ninth Circuit has held that it does. See, *Doe v. Attorney General of the United States*, 941 F.2d 780 (9th Cir. 1991); *J.L. & K.P. v. Social Security Administration*, 971 F.2d 260 (9th Cir. 1992). In the instant case, the D.C. Circuit has held that it does not. *Lane v. Pena*, Civ. No. 94-1608 (D.C. Cir. June 5, 1995), relying on *Dorsey v. United States Dept. of Labor*, 41 F.3d 1551 (D.C. Cir. 1994). The Court long has recognized the

resolution of such conflicts as one of its core functions. See, *infra*, section I.

A grant of certiorari also is called for in this case because it presents an issue of national significance. See, *infra*, section II. Petitioner poses a question critical to simple justice for a group -- people with disabilities -- who "are the poorest, least educated and largest minority in America." [2] The 1978 Amendments to Section 504, which extended that statute's coverage to the federal government, were motivated by Congressional appreciation of the scope and impact of government activities on the lives of Americans with disabilities. The extent of monetary damages caused by federal disability discrimination, and the importance of the right to recover such damages, is underscored by the fact that persons with disabilities are disproportionately represented among persons who are eligible for and benefit from many federal government programs. See, e.g., *Dorsey* (involving the federal Job Corps program, which provides services to 100,000 youths each year); and *J.L.* (involving the federal Supplemental Security Income program, which provides benefits to approximately 6 million Americans).

The record in this case clearly frames the legal question presented. See, *infra*, section III. The government does not dispute that petitioner Lane is entitled to the protection of Section 504, that Mr. Lane is qualified for enrollment in the U.S. Merchant Marine Academy, or that the government violated Section 504 by disenrolling him on the basis of his diabetes. Moreover, the parties have stipulated to the amount of petitioner's damages. Thus, the sole remaining issue is whether the federal government is liable for such damages.

The Court should grant the writ to reverse the erroneous decision of the District of Columbia Circuit, which threatens to seriously undermine the civil rights of people with disabilities subject to invidious discrimination by the federal

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2 Senate Comm. on Labor and Human Resources, The Americans with Disabilities Act, S. Rep. No. 101-116, 101st. Cong., 1st Sess. at p. 9 (1989)(quoting U.S. President George Bush).

government. See, *infra*, section IV. The court below failed to give proper weight to compelling arguments that the text of Section 504, as well as the history of the law and its amendments, establish that Congress effected a waiver of sovereign immunity so as to create a damages remedy against the federal government under Section 504.

In particular, the Court below failed to adequately account for this Court's decision in *Franklin v. Gwinnett County Public Schools*, 112 S. Ct. 1028 (1992), that all appropriate remedies, including monetary damages, are available against an entity subject to liability under Section 504, and failed to recognize the clear Congressional intent in the 1978 Amendments to Section 504 to provide against the federal government the same remedies provided against non-federal parties.

Finally, the Court of Appeals erred in holding that *U.S. v. Nordic Village* 112 S. Ct. 1011 (1992) requires judgment for the government. Petitioner has shown an "unequivocal waiver" of sovereign immunity as required by *Nordic Village* and numerous prior decisions of this Court. To the extent *Nordic Village* changed the law -- in 1992 -- by holding that legislative history has no bearing on construction of such waivers, it is inapplicable to construction of Congress's intent in 1978 in amending Section 504. Even after *Nordic Village*, the Supreme Court has construed the scope of waivers of sovereign immunity with attention to legislative history and the context in which Congress acted. See, e.g., *Smith v. United States*, 113 S. Ct. 1178 (1993). All of these authorities dictate that Section 504 damages suits will lie against the federal government. The Court should grant certiorari to clarify this important federal civil rights law issue.

ARGUMENT

I. THE PETITION FOR CERTIORARI SHOULD BE GRANTED BECAUSE THERE IS A DIRECT SPLIT OF AUTHORITY IN THE CIRCUIT COURTS OF APPEAL ON THE QUESTION OF WHETHER SECTION 504 AUTHORIZES SUIT FOR MONETARY DAMAGES AGAINST THE FEDERAL GOVERNMENT

On appeal of the instant case, the District of Columbia Circuit Court of Appeals summarily held, based on prior Circuit precedent, that suit would not lie against the federal government for monetary damages resulting from discrimination on the basis of disability, because Congress had not waived federal sovereign immunity to such suit under Section 504 of the Rehabilitation Act of 1973. *Lane v. Pena*, Civ. No. 94-1608 (D.C. Cir. June 5, 1995). [3]

In so ruling, the D.C. Circuit is in direct conflict with the Ninth Circuit's holdings that Congress has clearly authorized a damages remedy to redress federal government violations of Section 504's disability nondiscrimination mandate. *Doe v. Attorney General of the United States*, 941 F.2d 780 (9th Cir. 1991); *J.L. & K.P. v. Social Security Administration*, 971 F.2d 260 (9th Cir. 1992). Indeed, the D.C. Circuit cited and deliberately rejected the Ninth Circuit's *Doe* decision, thereby establishing an express split of authority among the U.S. Circuit Courts of Appeal.

Certiorari should be granted in this case pursuant to this Court's admonition that a principal purpose of certiorari

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3 The District of Columbia Circuit's June 5, 1995 order in the *Lane* case summarily affirmed the ruling of the lower court that damages are unavailable against the federal government, based on the Circuit Court's holding in *Dorsey v. United States Dept. of Labor*, 41 F.3d 1551 (D.C. Cir. 1994). While the *Dorsey* case originally established the conflict with Ninth Circuit precedent on this issue, the instant case presents an appropriate vehicle for resolution of this conflict, as noted by Mr. Lane in his Petition For A Writ of Certiorari ("the Petition") at p.13, n.13.

jurisdiction is to resolve such circuit conflicts. *Braxton v. United States*, 500 U.S. 344, 347 (1991); S. Ct. R. 10 (a) (effective Oct. 2, 1995).

II. THE PETITION FOR CERTIORARI SHOULD BE GRANTED BECAUSE THE ISSUE PRESENTED HAS A SUBSTANTIAL IMPACT ON THE 49 MILLION AMERICANS WITH DISABILITIES WHO ARE AFFORDED CIVIL RIGHTS PROTECTIONS UNDER SECTION 504

The question of whether Section 504 authorizes a damages remedy to redress disability discrimination by the federal government is of substantial concern to the 49 million Americans with disabilities---the largest minority group in the country, at approximately 20% of the U.S. population---who are afforded civil rights protections under the Rehabilitation Act. [4]

It was recognition of the interests and needs of Americans with disabilities, and specifically recognition of the injustice and hardship that results from disability discrimination, that prompted Congress to enact Section 504 in 1973, thereby prohibiting such discrimination by recipients of federal financial assistance. Consistent with the desire to eradicate barriers faced by persons with disabilities throughout all sectors of society, the 1978 Amendments to the Rehabilitation Act extended Section 504's coverage to the federal government itself. The 1978 Amendments were clearly motivated by Congressional appreciation of the reach and scope of federal government activities, and their impact

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4 The most recent U.S. Census Bureau data establish that there are 48.9 million Americans with some type of disability, representing 19.4% of the total population of the United States. Moreover, this percentage is expected to increase as the population becomes increasingly composed of older individuals. Americans with Disabilities: 1991-92. U.S. Bureau of the Census, Current Population Report P70-33. Washington, D.C.: U.S. Government Printing Office.

and influence on the lives of Americans with disabilities. The significant extent of this federal impact is clearly demonstrated by the type of facts that have been presented to courts in Section 504 cases.

In the instant case, for example, petitioner was delayed for two years, due to disability discrimination, in pursuing his post-secondary education at the U.S. Merchant Marine Academy, and thereby delayed in accessing the employment opportunities afforded to Academy graduates. His vulnerability to federal discrimination parallels that of other individuals with disabilities who wish to pursue educational opportunities in federally operated schools.

The plaintiff in the *Dorsey* case is representative of the thousands of economically and vocationally disadvantaged individuals with disabilities who seek to access the federal Job Corps program, which is administered by the U.S. Department of Labor to provide training and education for economically disadvantaged individuals between the ages of 14 and 22.[5] Similar to petitioner Lane, plaintiff Dorsey's participation in a federal educational program was interrupted by discrimination on the basis of disability, in his case when he was expelled from the Job Corps because he was HIV positive. As with petitioner Lane, Mr. Dorsey experienced damages resulting from unemployment and lost educational and vocational opportunities as well as emotional distress.

The Ninth Circuit's *J.L.* case involved the issue of accommodating persons with mental disabilities applying for federal Supplemental Security Income (SSI).[6] The

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5 The Job Corps program currently provides services nationwide to approximately 100,000 youths each year. Approximately 44,000 new youths are enrolled each year as a consequence of normal program turnover.

6 The most recent data available from the Social Security Administration establish that 5,984,234 persons received SSI during 1993. The data also establish that the number of persons receiving federally administered payments has been steadily rising since the SSI program began in 1974 (there were 3.2 million persons who received SSI benefits during this inaugural year, and with few exceptions the number of recipients has increase each year since then). See "Fast Facts

complexity and rigidity of the benefits application process in *J.L.* was alleged by plaintiffs to have created insurmountable barriers for precisely the persons the SSI program was intended to assist. Congress designed the SSI program, like other federal entitlement programs, in recognition of the dire needs of Americans trying to survive with incomes at or below the subsistence level. The importance of permitting recovery of the damages that can result from discriminatory denial of such entitlements---loss of subsistence income and its after effects---is underscored by the critical nature of the safety net such programs seek to create.[7]

& Figures About Social Security", U.S. Department of Health and Human Services, Social Security Administration, Office of Research & Statistics, SSA Publication No. 13-11785 at 23 (1994).

While statistics on the number of applicants for SSI are unavailable, at a minimum it can be documented that the over 5.9 million people who received SSI benefits in 1993 participated in the application process.

7 The extent of damages caused by federal government disability discrimination is underscored by the fact that persons with disabilities, such as the plaintiffs in *Dorsey* and *J.L.*, are disproportionately represented in the population of persons who are eligible for and in need of federal government programs providing vocational training, educational opportunities, and entitlement benefits.

For example, it is compelling to note that according to Louis Harris polls conducted in 1986 and 1987, two-thirds of Americans with disabilities between the age of 16 and 64 were not working at all, despite the fact that 66% of working age persons with disabilities indicated that they did want to work. 40% of adults with disabilities lack a high school diploma---three times more than non-disabled adults. See Louis Harris and Associates, The International Center for the Disabled (ICD) Survey of Disabled Americans: Bringing Disabled Americans Into the Mainstream. (1986). See also, The ICD Survey II: Employing Disabled Americans (1987).

These realities were noted by Congress, in the legislative history to the Americans with Disabilities Act of 1990 (ADA), as supporting a need for further disability rights legislation. This legislative history also takes note of the statement by President George Bush, who signed the ADA, that "statistics consistently demonstrate that disabled people are the poorest, least educated and largest minority in America." S. Rep. No. 101-116, 101st. Cong., 1st Sess. at p. 9 (1989).

It follows from these statistics that discrimination by the federal government in the conduct of programs serving the economically

Federal regulatory activity, which affects so many aspects of American society, has a similarly broad impact on the lives of persons with disabilities. For example, U.S. Department of Transportation regulations establish medical standards for interstate commercial truck drivers. Failure to comply with such standards will preclude employment in this field. To the extent that such standards illegally discriminate on the basis of disability, the federal government directly deprives persons with disabilities of this source of livelihood. [8]

As demonstrated by the above, federal programs providing educational and vocational opportunities, federal agencies providing entitlement benefits, and federal regulatory activities establishing employment qualifications have a dramatic effect on the lives of millions of persons with disabilities. To the extent that the federal government illegally discriminates in conducting such wide-ranging programs and activities, it causes substantial monetary damages of precisely

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disadvantaged has a correspondingly disproportionate impact on Americans with disabilities.

8 The following is offered as an illustration of the impact that federal regulatory activities can have. Pursuant to the direction of Congress as specified in the legislative history to the ADA, the U.S. Department of Transportation has undertaken a review of physical qualification standards for interstate commercial drivers of certain classifications of motor vehicles, to ensure that they are consistent with the requirements of Section 504 and the ADA. S. Rep. No. 101-116, 101st Cong., 1st Sess. 27-28 (1989); H.R. Rep. No. 101-485 (Part 2), 101st Cong., 2d Sess. 57 (1990).

As a result of this review, the Federal Highway Administration (FHWA) has instituted waiver programs involving drivers with diabetes and vision impairments. The FHWA's Diabetes Waiver Program currently has 122 enrolled drivers with that disability. As of August 1993, there were 2,656 drivers participating in the FHWA Vision Waiver Program, all of whom would have been denied interstate commercial driving privileges on the basis of disability but for the waiver. Preliminary data available as a result of the Vision Waiver Program indicate that, far from being a safety risk, Program participants are safer drivers than their non-vision impaired counterparts. See, Federal Highway Administration, Monitoring Drivers of Commercial Motor Vehicles Who Receive Vision Waivers (December 9, 1993).

the type for which a non-federal party would be clearly liable under Section 504.

This Court should grant certiorari to resolve the question of whether suit for such damages will lie against the federal government, in recognition of the significant impact of this issue on the lives of the 49 million Americans with disabilities.

III. THE PETITION FOR CERTIORARI SHOULD BE GRANTED BECAUSE THE INSTANT CASE IS A CLEAR VEHICLE FOR RESOLUTION OF THE LEGAL ISSUE PRESENTED

The record in this case clearly frames the legal question of whether suit for monetary damages will lie against the federal government under Section 504. Thus, *Lane* presents this Court with an ideal opportunity to resolve an important issue on which lower courts are in conflict.

As documented in the Petition, the federal government does not dispute in this case that petitioner Lane, who has diabetes, is an individual with a disability who is entitled to the protection of Section 504. The government has also chosen not to appeal judicial findings that Mr. Lane is qualified for enrollment in the U.S. Merchant Marine Academy, and that the government illegally discriminated against him in violation of Section 504 by disenrolling him on the basis of his diabetes.

Moreover, the parties to this case have entered into a joint stipulation specifying that, as a result of the government's discrimination, petitioner has sustained a total of $75,000 in damages, with further specification as to the monetary value of the lost income, out-of-pocket expenses, and pain and suffering that comprise the total damages award. See, Appendix C to the Petition at pp. 8a-10a.

There is thus no dispute as to the nature or amount of the damages at issue in this case, and no need for an offer of proof with respect to damages on remand. The only issue,

which is clearly presented by this case, is whether the federal government should be, as a non-federal party clearly would be, obligated to pay conceded damages to redress the injuries caused by its actions, which were found by a court in an undisputed holding to have been in violation of Section 504.

IV. THE PETITION FOR CERTIORARI SHOULD BE GRANTED BECAUSE THE DECISION OF THE D.C. CIRCUIT COURT WAS ERRONEOUS, AND REVIEW BY THIS COURT PROVIDES THE ONLY OPPORTUNITY TO REMEDY THE ILLEGAL DISCRIMINATION SUFFERED BY PETITIONER CONSISTENT WITH CONGRESSIONAL INTENT

A. The 1978 Amendments To Section 504 Were Intended To Put The Federal Government On "Equal Footing" With Non-Federal Parties, Which Are Clearly Subject To A Private Right Of Action For Monetary Damages Under The Rehabilitation Act.

As the Ninth Circuit has correctly noted, plain statutory language, buttressed by the legislative history of the Rehabilitation Act as articulated by Congress over the past two decades, makes it "starkly clear" that the 1978 Amendments to Section 504 were "intended to put the federal government on equal footing with everyone else" with respect to both the requirements and enforcement of the disability nondiscrimination mandate. *Doe v. Attorney General of the United States*, 941 F.2d 780, 792 (9th Cir. 1991); see also, *J.L. & K.P. v. Social Security Administration*, 971 F.2d 260 (9th Cir. 1992).

As recognized by this Court, it is clear that a private right of action for compensatory damages will lie against non-federal parties under Section 504. *Franklin v. Gwinnett County Public Schools*, 112 S. Ct. 1028 (1992). Indeed, the federal government itself has made this argument in *amicus*

briefs that it has filed in disability rights cases involving non-federal parties. See e.g., May 16, 1995 *Amicus* brief filed by the U.S. Department of Justice (DOJ) in *Tyler v. City of Manhattan, Kansas*, Civ. No. 94-3344 (10th Cir.) (arguing that private plaintiffs are entitled to damages for both intentional and unintentional discrimination); May 1993 DOJ *Amicus* brief filed in *Galloway v. Superior Court of the District of Columbia*, Civ. No. 91-0644 (D.C. Cir.) (arguing availability of damages). [9]

By equalizing federal and non-federal remedies in the 1978 Amendments to the Rehabilitation Act, Congress has thus subjected the federal government to a private right of action for monetary damages.

B. The 1978 Amendments Clearly Evidence The Necessary "Unequivocal Expression" Of Waiver Of Federal Sovereign Immunity To Suit For Monetary Damages.

Through the 1978 Amendments to Section 504 equalizing federal and non-federal remedies, Congress has clearly effected the necessary "unequivocal expression" of waiver of federal sovereign immunity for damages, as required by the body of case law most recently including *U.S. v. Nordic Village, Inc.*, 112 S. Ct. 1011 (1992).

As reaffirmed by *Nordic Village*, it is a settled rule of law that before Congress will be understood to have waived the federal government's sovereign immunity from suit, the waiver must be "unequivocally expressed." 112 S. Ct. at 1014 (1992).

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9 The *Tyler* case was brought under Title II of the Americans with Disabilities Act of 1990 ("The ADA"). However, the Justice Department's position as to the availability of damages under ADA is relevant because Title II expressly provides that the "remedies, procedures and rights set forth in Section 505 of the Rehabilitation Act of 1973 (29 U.S.C. § 794a) shall be the remedies, procedures, and rights this title provides . . . ." 42 U.S.C. § 12133. The *Galloway* case was brought under both the ADA and Section 504.

While generally waivers are not to be liberally construed, this Court has "on occasion narrowly construed exceptions to waivers of sovereign immunity where that was consistent with Congress's clear intent, as in the context of the 'sweeping language' of the Federal Tort Claims Act." *Nordic Village*, 112 S. Ct. at 1014 (citations omitted). [10]

This Court has also recognized that it should not "'assume the authority to narrow the waiver that Congress intended,' or construe the waiver 'unduly restrictively.'" *Irwin v. Dept. of Veterans Affairs*, 111 S. Ct. 453, 467 (1990)(quoting *Bowen v. City of New York*, 106 S. Ct. 2022, 2029 (1986)(internal citations omitted)).

In applying the rule of law requiring "unequivocal expression" of Congressional waivers of sovereign immunity, judicial statutory construction of the scope of such waivers has historically taken into consideration legislative history and

10 Relatively broad construction of waivers, and corresponding narrow construction of exceptions to waivers, has often been applied to cases brought against the federal government under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e et seq. See, e.g., *Irwin*, 111 S. Ct. 453 (1990) (equitable tolling rule applicable to suits against private defendants also applies to suits against the federal government under Title VII); *Loeffler v. Frank*, 486 U.S. 550 (1988) (prejudgment interest may be awarded in a suit against the U.S. Postal Service under Title VII); *Chandler v. Roudebush*, 425 U.S. 840 (1976)(plaintiff's right to trial *de novo* extends to suit against federal government as well as against non-federal parties).

Moreover, in cases in which this Court has ruled to the contrary in Title VII cases, the holding has been grounded in clear evidence that Congress did not intend equal treatment of federal and non-federal parties. See, e.g., *Library of Congress v. Shaw*, 478 U.S. 310 (1986)(Congressional awareness of long-standing "no interest" rule against the federal government precludes finding waiver as to interest absent explicit statement to that effect in Title VII); *Brown v. General Services Administration*, 425 U.S. 820 (1976)(precisely drawn, detailed statutory structure and legislative history of Title VII provides clear evidence that Congress intended it to be exclusive judicial remedy for claims of discrimination in federal employment).

Congressional intent of precisely the kind on which the Ninth Circuit based its decisions in *Doe* and *J.L.* [11]

Nevertheless, in the reasoning of the D.C. Circuit in *Dorsey*, the legislative history to which the Ninth Circuit looked in *Doe* and *J.L.* must be disregarded, because this Court's 1992 decision in *Nordic Village* has changed the law by holding that legislative history has no bearing on construction of waivers of federal sovereign immunity. Such a change in law, if indeed it has occurred, is clearly inapplicable to the interpretation of Section 504, given that the pronouncement to disregard legislative history is directly contrary to prior judicial statutory interpretation of which Congress can be presumed to have been aware when it enacted the Rehabilitation Act in 1973, and amended it in 1974, 1978, 1986 and 1990. See, *Cannon v. University of Chicago*, 441 U.S. 677 (1979); and *Cort v. Ash*, 422 U.S. 66 (1975)(identifying legislative history and intent as critical to judicial determination of whether a remedy has been created by statute).

Moreover, it should be noted that in cases after *Nordic Village*, even when basing decision on statutory language this Court has continued to construe the scope of waivers of sovereign immunity with attention to legislative history, legislative purpose and the context in which Congress acted. See, e.g., *Smith v. United States*, 113 S. Ct. 1178 (1993). In construing the Federal Tort Claims Act, the *Smith* court went so far as to note that "if it were quite clear from the balance of the statute" that a particular governmental liability was intended, statutory failure to specify such liability "might be

11 Cases where this Court has discussed and considered legislative history include, e.g., *Ardestani v. INS*, 112 S. Ct. 515, 520 (1991); *Loeffler v. Frank*, 486 U.S. 549 (1988); *Library of Congress v. Shaw*, 478 U.S. 310, 319 (1986); *Franchise Tax Board of California v. United States Postal Service*, 467 U.S. 512 (1984); *U.S. v. Mitchell*, 445 U.S. 535 (1980); *U.S. v. Kubrick*, 100 S. Ct. 352 (1979); *Brown v. General Services Administration*, 425 U.S. 820 (1976); *Chandler v. Roudebush*, 425 U.S. 840 (1976); and *U.S. v. King*, 89 S. Ct. 1501, 1503 (1969).

treated as a statutory gap that the courts could fill by decisional law." *Id.* at 1182. [12]

Thus, even after *Nordic Village*, it remains true that, far from requiring specific magic words in statutory text to effect a waiver, the relevant rule of decision is to avoid a "crabbed construction" that "overlooks our admonition that waiver of sovereign immunity is accomplished not by `a ritualistic formula'; rather intent to waive immunity and the scope of such a waiver can only be ascertained by reference to underlying Congressional policy." *Franchise Tax Board*, 467 U.S. at 521. See also, *Dellmuth v. Muth*, 491 U.S. 223, 233 (1989)(Scalia, J. concurring) (Congressional elimination of state sovereign immunity is not precluded even if statutory text lacks explicit reference to such immunity or to the Eleventh Amendment).

Pursuant to the applicable body of case law regarding the construction of Congressional waivers of federal sovereign immunity, the statutory language and legislative history of the 1978 Amendments to Section 504 must be read to subject the federal government to suit for monetary damages.

C. Legislative History To The 1992 Reauthorization Of The Rehabilitation Act Expressly Reaffirmed The Availability Of A Monetary Damage Remedy Against The Federal Government, And Approved The Ninth Circuit's Decisions In *Doe* And *J.L.*

The Congressional intent to waive sovereign immunity and extend all of the protections of Section 504 to victims of

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12 It should also be noted that the body of case law developed under civil rights statutes such as Title VII clearly provides a more analogous model for this Court's evaluation of Section 504 than do cases such as *Nordic Village*, which involved construction of a provision of the Bankruptcy Code. See discussion at n.10, above.

discrimination by the federal government has been reaffirmed by the legislative history accompanying the 1992 reauthorization of the Rehabilitation Act of 1973.

In that history, Senator Jeffords, the primary author of the 1978 Amendments to Section 504, endorsed the statutory interpretations made by the Ninth Circuit in the Doe and *J.L.* cases, and expressly disapproved of cases similar to *Dorsey* that had held that no damage remedy lies against the federal government:

> [These decisions are] in direct contrast to rulings in the ninth circuit in *Doe v. Attorney General of the United States*, 941 F.2d 780 (9th Cir. 1991) and *J.L. v. Social Security Administration*, [971 F.2d 260 (9th Cir. 1992)], and the intent of Congress in 1978 to cover the Federal Government with the same anti-discrimination mandate which is applicable to private recipients of Federal financial assistance.

138 Cong. Rec. 16609 (October 5, 1992).

Senator Jeffords expressly endorsed the Ninth Circuit's pronouncement in the *Doe* case that:

> [t]he Rehabilitation Act's legislative history . . . demonstrates Congress's intent . . . to permit enforcement [against the federal government] through the same means available against private parties; enforcement in the courts with *damages* and equitable remedies.

Id., quoting *Doe*, *supra*, 941 F.2d at 793-794 (emphasis added).

The 1992 legislative history thus confirms that the "language of the 1978 amendments is sufficient on its face to confer" a "private right of action [for damages] against the Federal Government." 138 Cong. Rec. 16609. Indeed, in the words of Senator Jeffords, "[t]o construe the statute otherwise would be the height of hypocrisy, expecting private

entities to bear a burden that the Federal Government itself is unwilling to carry." *Id.*

In short, it is clear that statutory structure and legislative history of Section 504 are sufficient to provide the required "unequivocal expression" of waiver of federal sovereign immunity to suit for monetary damages. The District of Columbia Circuit Court of Appeals was thus in error in holding that suit for monetary damages will not lie against the federal government under Section 504. This Court should grant certiorari in this case to redress the D.C. Circuit's erroneous holding, and to afford petitioner the damages remedy to which he is clearly entitled by Congressional mandate.

CONCLUSION

For the foregoing reasons, the Court should grant the Petition for a Writ of Certiorari.

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AMICUS CURIAE

BRIEF

(7)

Supreme Court, U.S.
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No. 95-365

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1995

JAMES GRIFFIN LANE,

Petitioner,

v.

FEDERICO F. PENA, SECRETARY OF TRANSPORTATION, ET. AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF *AMICUS CURIAE* AMERICAN DIABETES ASSOCIATION IN SUPPORT OF PETITIONER

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BRIEF OF *AMICUS CURIAE* AMERICAN DIABETES ASSOCIATION IN SUPPORT OF PETITIONER

PRELIMINARY STATEMENT

The importance of a complete remedy for the violation of a right is deeply rooted in the common law. In commenting on Magna Carta, Lord Coke stated:

> "And therefore every Subject of this Realm, for injury done to him *bonis, terris, vel persona* [i.e. goods, lands, or person], . . . may take his remedy by the course of the Law, by any other subject . . . and have justice and right for the injury done him, freely without sale, fully without any denial, and speedily without delay.
>
> "Hereby it appeareth, that Justice must have three qualities, it must be Libera, quia nihil iniquius venali Justitia [free, for nothing is more iniquitous than justice for sale]; Plena, quia Justitia non debit claudicare complete, for justice should not do things by halves]; & Celeris, quia dilatio est quaedam negatio [swift, for justice delayed is justice denied]; and then it is both Justice and Right.[1]

Indeed, for justice to do right it must be complete.

> "It is a vain thing to imagine a right without a remedy; for want of a right and want of a remedy are reciprocal.[2]

In more modern words, the value of a right is defined by the remedy available if that right is violated.

QUESTION PRESENTED

Should the executive agencies of the Federal Government,

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[1] Coke, *Second Institute* 55-56 (4th Ed. 1671) quoted in Thompson *Magna Carta: Its Role in Making of the English Constitution*, 1300-1629, at p. 365 (1948).

[2] *Ashby v. White*, 2 Raymond 953 (1703).

and only those agencies, be exempt from paying damages for harm caused by their violation of the Rehabilitation Act?

STATEMENT ABOUT *AMICUS*

Amicus Curiae, the American Diabetes Association ("Association") is the nation's oldest, largest and leading voluntary health organization addressing diabetes-related concerns. The mission of the Association is to prevent and cure diabetes and to improve the lives of all people affected by diabetes.

The Federal Government impacts the lives of the more than 16 million Americans with diabetes in many and varied ways. The Federal Government is the largest single employer in the country and the executive agencies regulate and control many of the benefits, privileges and rights of people with diabetes. From the Veterans' Administration's provision direct medical benefits to the Department of Transportation's regulation of licensing of commercial truck-drivers, executive agencies have a pervasive influence on the care and employability of Americans with diabetes.

It is in this context that *amicus* urges this Court not to

eviscerate the protections of the Rehabilitation Act concerning discrimination by the Federal Government for Americans with diabetes.

ARGUMENT

NATIONAL POLICY REQUIRES THE FULL PROTECTION OF CIVIL RIGHTS FOR THE DISABLED AND THE OPPORTUNITY FOR FULL EQUITABLE AND LEGAL REMEDIES FOR THE VIOLATION OF THOSE RIGHTS.

A right without a remedy is a cruel irony and a fundamental injustice. In this case, the D.C. Circuit has declared that the Department of Transportation violated Lane's rights under the Rehabilitation Act and that he is entitled to reinstatement as a student at the United States Merchant Marine Academy, but is not entitled to recover the compensatory damages to which the parties have stipulated. This is a classic example of a right without a remedy and justice by "halves".

Lane's struggle with the Merchant Marine Academy is representative of the daily struggle of millions of persons with diabetes. Every day, Americans with diabetes face the consequences of prejudice, stereotyping and unfounded fear about diabetes, and especially the work capacity of Americans with diabetes. Although

Mr. Lane had his diabetes "under 'extremely good control'" and that he "repeatedly achieved an 'outstanding' rating on a physical readiness exam", he was denied the opportunity for education and employment as a merchant marine officer. The trial court in *Lane v. Pena* summarized Lane's ability most eloquently when he stated:

> ". . . the government, through taxpayer dollars, also made an investment in his training and, as Lane's record shows, their investment was a good one. It is undisputed that, if Lane continues to control his diabetic condition, he will make a fine merchant marine officer. . . ."
>
> "Indeed, the Court observes that the government will likely benefit greatly from his service." *Lane v. Pena*, 867 F.Supp. 1050, 1071-1072 (D.C. Cir. 1994).

This case exemplifies the need for the Rehabilitation Act to shield the most vulnerable of our citizens from arbitrary and irrational discrimination based upon "prejudice, stereotypes and unfounded fear."[3] If James Lane can be turned away so capriciously from the window of opportunity, then the shroud of prejudice shall darken the future for all disabled Americans. Lane's vindication

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[3] *School Board of Nassau County, Florida v. Arline*, 480 US 273 (1987).

needs to be twofold: his right to opportunity must be protected and the damage he suffered must be compensated. Lane must be made whole.

This Court has already recognized that the availability of damage awards in civil rights suits serve both the broad public purpose of eliminating discrimination and the private purpose of making the victims whole. *See*: *McKinnon v. Nashville Banner Publishing Co.*, 115 S.Ct. 879 (1995); *Hensley v. Eckerhart*, 461 U.S. 424 (1993). The potential of a damage award deters discriminatory practices and induces compliance with legislative mandates to protect Americans against such discrimination. *See*: *Owen v. City of Independence, Mo.*, 445 U.S. 622, 651-652 (1980); *Smith v. Wade*, 461 U.S. 30, 50 (1983).

How can we justify a technical argument that the executive agencies of the Federal Government, who by purpose and design protect the most vulnerable of our citizens from arbitrary and unreasonable practices, cannot be held responsible for the full consequences of their own discriminatory practices? How can we expect these agencies to protect the rights of disabled Americans if

they themselves cannot be held responsible for the full consequences of their own discriminatory practices? How do we impress upon these agencies that the law must be followed if the only consequence for their own discriminatory practices is equitable relief for a single person?

If the Rehabilitation Act is to accomplish its purpose, remedies for discriminatory practices must be sharply focused and uniformly applied. The remedy must reflect all of the consequences of discriminatory practices, including damages.

According to the most recent statistics, there are over 16 million Americans with diabetes, about 7% of our population. Unfortunately, new cases of diabetes are being diagnosed at the rate of approximately 1,800 per day or over 650,000 Americans each year.[4] Diabetes is a growing national health problem with significant economic impact. Over 50% of the Americans with diabetes are women. Nearly 10% of the Afro-American, Mexican-American,

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[4] *Diabetes Statistics*, National Diabetes Information Clearinghouse, National Institutes of Health (NIH Publication No. 96-3926) (1995).

Cuban-American and Puerto Rican-American ethnic and racial groups have diabetes while native Americans have nearly a 50% incidence rate of diabetes. As Americans age, the incidence of diabetes dramatically escalates.[5] The incidence of diabetes in the protected portions of our population (race, ethnic, gender and age) is large and is growing geometrically. Not only do our fellow Americans of various races, cultures and ethnic backgrounds face discriminatory practices based upon who they are, the fact that they have diabetes creates for some entities a further rationale for discrimination.

Americans with diabetes face serious health complications which include heart disease, stroke, high blood pressure, blindness, kidney disease, nerve disease, amputation, complications of dental disease and complications of pregnancy.[6] The life-long economic burden is enormous for Americans with diabetes.[7]

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[5] *Diabetes In America,* National Diabetes Data Group, National Institutes of Health (NIH Publication No. 95-1468) (1995).

[6] Ibid.

[7] Ibid.

Economic burdens of health care and minority status when added to discriminatory practices based on disability can be an overwhelming burden on a citizen's capacity to exercise his rights. To deny a full remedy for the enforcement of rights deters the pursuit of those rights to the detriment of both the individual and society. As "the poorest, least educated and largest minority in America", people with disabilities have enormous difficulty accessing legal representation and enforcing their basic civil rights. *See: City of Riverside v. Riviera*, 477 U.S. 561, 577 (1976); *S. Rep. No.* 101-116, 101st Congress, First Sess. at 9 (1989).

Those who are discriminated against because of their disability have the right to compensation for damages in every jurisdiction and against every defendant except against a federal agency in the District of Columbia. As a nation, we deal with the rights of ethnic and racial minorities and offer them protection and relief from the oppression of ignorance and prejudice. As a nation, we reach out for gender equality to create an equal opportunity for all of our citizens. As a nation, we protect thedisabled from denial of equal access and opportunity solely because of their disability.

Now, in the District of Columbia, various protected groups already under the panoply of the many and varied civil rights acts are confronted with a new barrier of inequality.

It is unacceptable that "prejudice, stereotypes and unfounded fear" about diabetes should be permitted to stop the progress toward equal opportunity and fair and equal treatment for persons with diabetes. The barrier created by the District of Columbia will chill the enforcement of the rights of the disabled under the Rehabilitation Act.

The trial court elaborated on the history of the inconsistent conduct by the Merchant Marine Academy where some, but not all, disabilities had triggered disenrollment and where there had been no individualized assessment of an outstanding student. Arbitrary and inconsistent decisions are the historical burdens suffered by persons with disabilities and, in particular, persons with diabetes. The present case highlights the need for complete remedies for vindicated rights because of arbitrary and inconsistent discriminatory practices.

A recent settlement in *Kenneth Dugger v. Lloyd M. Bentsen, Secretary, U.S. Dept. of Treasury, (C.D. Cal. 1994)* (Civil Case No.

93-2631) illustrates the recognition of the need to compensate for damages caused by discriminatory conduct towards a person with diabetes. Mr. Dugger filed his action under the Rehabilitation Act "to correct the unlawful employment practices in the job selection process and to make the plaintiff whole". Mr. Dugger's claim was based upon the fact that his diabetes was the sole cause of his non-selection as a criminal investigator (special agent) for the Department of Treasury. After winning his Motion for Summary Judgment on the substantive merits, Treasury agreed to compensate Mr. Dugger for lost retirement contributions, lost back pay, compensatory damages and attorney fees and costs for the litigation.

The *Dugger* case illustrates two important points. First, it is an articulation of the kinds of damages that are suffered by disabled persons when they are discriminated against and when they attempt to enforce their rights under the Rehabilitation Act. In Mr. Dugger's case settlement was for $67,000. If there was no hope of reimbursement, it would be the rare plaintiff that could afford to spend or risk this amount of money to pursue his rights no matter how egregious the discrimination. Second, the prospect of an

economic settlement forced additional accountability on the management within a federal agency. The potential of damages focuses the need to make lawful and responsible decisions. Without this economic accountability, there is no compelling pressure that will impact budgets and decision-makers so as to deter and discourage discriminatory practices.

V. CONCLUSION

Amicus, on behalf of 16 million Americans with diabetes, asks this Court to make Mr. Lane whole and provide the meaningful remedies of the Rehabilitation Act for disabled Americans when they are discriminated against by the Federal Government. Mr. Lane's Petition in this case stands for equal justice under the law and for a full and fair remedy under the Rehabilitation Act.

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